

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Subhendu Samanta

FAT No. 308 of 2023

Smt. Gitarani Maity

-vs-

1A. Mrs. Krishna Chakraborty and others

For the appellant : Mr. Sourav Kumar Mukherjee,
Mr. Kaushik Chowdhury,
Ms. Sahana Pal.

For the respondents : Mr. Rajdeep Bhattacharya,
Ms. Adrija Bhattacharya.

Heard on : January 9, 2025.

Judgment on : January 9, 2025.

Sabyasachi Bhattacharyya, J.:

1. As per previous direction, the appeal itself is taken up for hearing along with the application.

2. The present appeal has been preferred by the plaintiff in a suit for specific performance of contract.
3. By the impugned judgment and decree, the learned trial Judge, simultaneously allowed an application of the respondent/defendant under Section 8 of the Arbitration and Conciliation Act, 1996 (in short “1996 Act”) and dismissed the suit itself.
4. Learned counsel for the appellant argues that even Section 8 of the 1996 Act does not contemplate a dismissal of the suit, but merely speaks about reference to arbitration.
5. That apart, the defendant/respondent did not take out any application under Section 8 of the 1996 Act either simultaneously with or prior to the filing of the written statement, which was the first statement on the merits of the defence within the contemplation of Section 8 of the 1996 Act.
6. Hence, in any event, the application under Section 8 of the 1996 Act filed subsequent to the filing of the written statement in the trial Court ought to have been dismissed by the learned trial Judge.
7. Learned counsel appearing for the defendant/respondent cites an unreported judgment of a learned Single Judge of the Delhi

High Court dated November 6, 2023 in the matter of *Madhu Sudan Sharma & Ors. Vs. Omaxe Ltd.* In the said judgment, the learned Single Judge of the Delhi High Court, by relying on a previous Division Bench judgment of the Delhi High Court in the matter of *Sharad P. Jagtani Vs. Edelweiss Securities Limited*, arrived at the conclusion that even if an application under Section 8 of the 1996 Act was not filed but a proper objection as to jurisdiction of the Civil Court on the ground of existence of an arbitration clause was taken in the written statement, the matter ought to be referred to arbitration.

8. Upon a careful consideration of the arguments of the parties, we are of the opinion that the impugned judgment is bad in law on two very important counts.
9. First, even if an application for reference to arbitration under Section 8 of the 1996 Act was to be entertained by the learned trial Judge, the suit could not have been dismissed as a whole. The matter only ought to have been referred to arbitration.
10. Secondly and more importantly, in the present case, the defendant/respondent took out an application under Section 8 of the 1996 Act only after filing of the written statement, thereby defying the mandate of Section 8 of the 1996 Act itself.

11. Section 8 of the of the 1996 Act is quoted below for the purpose of convenience:

“8. Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it find that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before the court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

12. A bare perusal of the said Section clearly shows that a judicial authority can only refer the matter to arbitration in view of the existence of an arbitration agreement/clause if the party seeking such reference applies for such reference not later than the date of submitting his first written statement on the substance of the dispute. The first statement on the substance of the dispute in case of a civil suit is, without doubt, the written statement filed by the defendant.
13. It is an admitted position that in the present case, the application under Section 8 of the 1996 Act was filed after the filing of the written statement and as such, the provision of Section 8 of the 1996 Act could not have been invoked by the learned Civil Judge.
14. Another limb of argument of the defendant/respondent is that in paragraph no. 12 of the written statement, the defendant pointed out that the Civil Court has no jurisdiction to

entertain the suit in view of Clause 22 of the agreement dated May 28, 1993 and, as such, the same should be dismissed.

15. It is argued by the respondent that Clause 22 was an arbitration clause and as such, paragraph no. 12 of the written statement should be construed to come within the purview of an objection taken under Section 8 of the 1996 Act.
16. With utmost respect, we are unable to express our agreement with the view taken by the learned Single Judge of the Delhi High Court in this context.
17. It was specifically held by the Supreme Court in the case of *Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya* reported at (2003) 5 SCC 531 that an application under Section 8 of the 1996 Act has to be filed before the filing of the first statement on the substance of the dispute.
18. Thus, the view taken by the Delhi High Court is contrary to such proposition.
19. Moreover, on the other aspect as to whether an objection in the written statement as to jurisdiction of the Court can be construed to be an application under Section 8 of the 1996 Act, we also are unable to agree with the arguments of the respondent.

20. There is a gulf of difference between an objection that the learned Civil Court does not have jurisdiction to entertain a suit at all and that the suit should be dismissed on such ground, and an objection that the subject matter of a civil suit, being also the subject matter of an arbitration agreement, ought to be referred to arbitration.
21. Section 8 of the 1996 Act contemplates a reference to arbitration of a dispute regarding which there is an arbitration clause and does not operate as a bar to the civil court's jurisdiction as such. Even if a reference is made to the arbitrator, the civil court does not lose the subject jurisdiction.
22. It is only by operation of Section 8 of the 1996 Act that the civil court has to refer the matter to arbitration.
23. Moreover, the provision of Section 8 of the 1996 Act contemplates a bar, if at all, which can be waived by the parties. A bar which can be waived by parties is not an absolute bar on the jurisdiction of the civil court coming within the connotation of "express or implied bar" as contemplated in Section 9 of the Code of Civil Procedure.
24. In the event no application for reference to arbitration under Section 8 of the 1996 Act is made by either party, the civil

court may very well entertain the suit and proceed with the adjudication of the same on merits in accordance with law.

25. Hence, we do not find that the existence of an arbitration clause in the concerned agreement between the parties operates *per se* as a bar to the jurisdiction of the civil court. Thus, the objection taken in paragraph no. 12 of the written statement in the present case, regarding the civil court not having jurisdiction even to entertain the suit and seeking dismissal of the suit on such ground, cannot be at par with an application seeking reference to arbitration under Section 8 of the 1996 Act. The two operate at different levels.
26. Hence, we cannot, under any stretch of imagination, equate such an objection taken in the written statement as to jurisdiction, seeking dismissal of the suit, with an application to refer the matter to arbitration.
27. Thus, on the said point, we humbly express our disagreement with the view taken by the learned Single Judge of the Delhi High in the cited judgment.
28. In view of the above discussions, the learned trial Judge committed a patent error of law on both counts: first, the suit could not have been dismissed under Section 8 of the 1996

Act and secondly, the Section 8 application, having not been filed before or even simultaneously with the written statement of the defendant, could not have been entertained at all by the learned trial Judge.

29. Accordingly, FAT 308 of 2023 is allowed on contest, thereby setting aside the impugned judgment and decree dated April 21, 2023 passed by the learned Civil Judge (Senior Division), Third Court at Alipore, District – South 24 Parganas in Title Suit No. 1110 of 2017 (Sl. No. 84/2017) and remanding the matter, directing the learned trial Judge to take up and decide the suit on merits upon a full-fledged trial in accordance with law.
30. The application under Section 8 of the 1996 Act filed by the defendant/respondent in the court below stands hereby dismissed as well.
31. However, we make it clear that we have not gone into the counter contentions of the parties in the suit and it will be open to the learned trial Judge to independently decide the suit on its merits, except the issue of maintainability of the suit on the ground of jurisdiction due to existence of the arbitration clause.

32. In view of disposal of the appeal, the connected application bearing CAN 1 of 2023 is also disposed of accordingly.

I agree.

(Subhendu Samanta, J.)

(Sabyasachi Bhattacharyya, J.)